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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~869~~ 32

JOSEPH SERAO, CHARLES CAFARO
and BENJAMIN GENETEMPO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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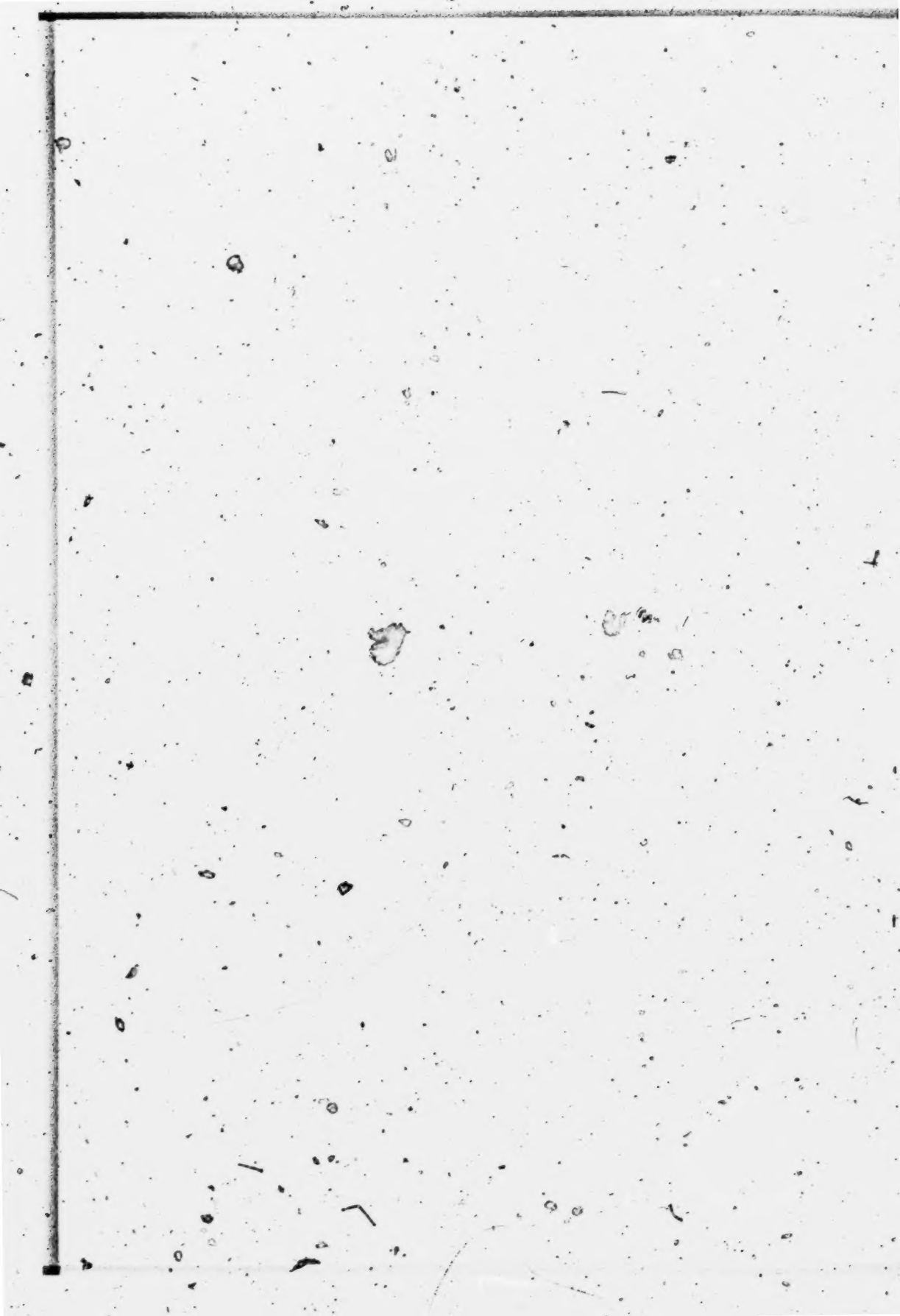

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JOSEPH SERAO, CHARLES CAFARO
and BENJAMIN GENETEMPO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on October 20, 1966.

Citations to Opinions Below

The opinion of the Court of Appeals is as yet unreported and is printed as Appendix A hereto, *infra,* p. 15. The judgment of the Court of Appeals is printed as Appendix B hereto, *infra,* p. 23. The opinion of the District Court in regard to the defendants' pretrial motion to suppress is printed as Appendix C hereto, *infra,* p. 25.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 20th day of October, 1966. By an order dated November 17, 1966, Mr. Justice Harlan extended the petitioners' time in which to file their petition for a writ of certiorari to and including December 19, 1966. The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254 (1).

Questions Presented

1. Do not the federal wagering tax statutes here involved violate the petitioners' privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22 (1953) and *Lewis* v. *United States,* 348 U.S. 419 (1955)?

2. (Presented on behalf of petitioners Cafaro and Genetempo only.) May probable cause sufficient for the issuance of a search warrant for an apartment be found by a magistrate, in a gambling case, based solely on the visits of a person known or believed to have taken bets at other and different locations, without any showing of the existence of gambling activity or apparatus at the premises for which the warrant is issued?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 4401(c) of Title 26 of the United States Code provides:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Section 4411 of Title 26 of the United States Code provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 4412 of Title 26 of the United States Code provides:

> "(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

Section 7203 of Title 26 of the United States Code provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000,

> or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7262 of Title 26 of the United States Code provides:

> "Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

Statement

Petitioners Serao, Cafaro and Genetempo were each convicted of one count of failing to pay the special tax imposed on persons engaged in receiving wagers on behalf of a person engaged in the business of accepting wagers, 26 U.S.C. §§ 4411, 4401, and of one count of failing to register as required by 26 U.S.C. 4412. Petitioner Serao was sentenced to six months imprisonment on each count, the sentences to run concurrently; petitioner Cafaro was sentenced to one year's imprisonment, the sentences to run concurrently; petitioner Genetempo was sentenced to one year on each count, the sentences to run concurrently, and fined five thousand dollars.

Factually, the Government's case was this: Serao, using the *nom de guerre* Joe Carroll, made the acquaintance of Treasury Intelligence Agent Brown in a Manhattan tavern and thereafter Brown placed bets with Carroll. At first these were placed in person, then later by telephone to three varying telephone numbers. If the statutes are constitutional, the conviction of Serao (Carroll) must stand. One of those who received the agent's telephone bets was the peti-

tioner Cafaro, and this was established at trial by identification of betting records in his handwriting, seized pursuant to search warrants. One of those warrants, which we assert was invalid, was for a so-called "tally room" on West 87th Street in New York, leased by petitioner Genetempo and in which betting records in Genetempo's handwriting were found. The mysteries of horse and sports betting were explained by Treasury Intelligence Agent Cotter, who testified that bets were commonly taken over the telephone at "wire rooms" and in due course entered into accounting records called tally sheets at locations where there were no telephones, known as tally rooms, which were presumably kept without telephones to minimize the likelihood of detection. Pre-trial, Judge McGohey dismissed motions to suppress on the grounds that movants Cafaro and Genetempo lacked standing to attack the warrant for the 87th Street tally room. During the course of the trial it was developed by the witness Battan (T. 193-198)* that Genetempo had rented the tally room and that some writings in Cafaro's hand were recovered from the tally room and that Cafaro was seen at the tally room. Accordingly Judge McMahon reconsidered the questioned of the warrants on the merits and once again sustained them (A. 28-38).* The Court of Appeals in its opinion, *infra* pp. 18-20, affirmed the validity of the warrant for the 87th Street tally room, which was the only warrant we attacked in that court and the only warrant which we attack here. Such additional facts as are required for the consideration of our attack on the warrant are set out in our discussion of that point below.

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* Numbers in parentheses preceded by A. refer to appellants' joint appendix in the court below, filed as part of the record with this court, and those preceded by T. refer to the stenographic transcript of the trial.

Reasons for Granting the Writ

A. The statutes under which the petitioners were convicted are unconstitutional.

After this case was tried, but before it was argued, this Court granted certiorari in *Costello* v. *United States,* No. 826 of the October 1965 Term, 34 LW 3320 (3-22-66), and our first question closely parallels the question as to which this Court granted certiorari in the *Costello* case. After the instant case was argued, but before it was decided, this Court granted certiorari in *Grosso* v. *United States,* 35 LW 3109 (10-11-66). The Court of Appeals summarily rejected our attack on the statutes and our suggestion that it defer decision until this Court's resolution of the *Costello* case. We very much desire an opportunity to brief and argue this question on the merits. We respectfully suggest to this Court that these statutes mock the vitality and reality of the Fifth Amendment privilege, in favor of a fiction which effectively brings the Federal Government into the enforcement of local sumptuary laws against gambling. The net effect of this is not, so far as may be determined, to inhibit gambling (a probably impossible objective), but merely to erode an important constitutional privilege and lessen the public respect for the enforcement of the federal criminal law.

B. The warrant for the search of the 87th Street tally room was obtained in violation of the Fourth Amendment standards.

According to the testimony which was presented at the trial, but not to the Commissioner who issued the search warrant for the 87th Street tally room, the tally room functioned as a place where accounting records were kept, tally sheets. Accordingly the warrants for the wire rooms, which

we do not attack, were based on affidavits (A. 15, 19, 23) each of which contained the flat assertion that an agent had placed a bet, or bets, over telephones located in the premises sought to be searched, and from this the Commissioner might reasonably infer that at those very places there were people taking bets, and perhaps even that the people in those premises were in the business of taking bets. The warrant for the 87th Street premises, the so-called tally room, proceeds, however, on a wholly different theory, which we may call that of "portable" or "contagious" probable cause. The affidavit in support of the warrant is set out below.* (A. 11) An examination of that affidavit

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* UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Commissioner's Docket No. 2
Case No. 492

In the Matter of an Application for a Search Warrant affecting Apt. B, 327 West 87st St., New York, New York

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HON. FRANK R. ABBOTT, U. S. Courthouse, Foley Sq., New York, N. Y.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Apt. B, 327 West 87th Street, New York, New York in the Southern District of New York, there is now being concealed certain property, namely gambling paraphernalia, including but not limited to horse betting slips, baseball and bas' et ball slips, other sporting slips and money, which are being used as means of committing a criminal offense, to wit, the business of accepting and receiving wagers, in violation of 26 U.S.C. §§4401, 4411, 4412 and 7272,

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wire-rooms, with an individual known as Joe Carroll. 2. Who observed

discloses immediately, first, the absence of any allegation that bets were placed by phone at that location, second, the fact that the Government had observed the inside of the apartment sought to be searched (Allegation 4 in affidavit for warrant) and seen Carroll inside but does not allege the observation of any gambling paraphernalia or apparatus. The Court of Appeals concluded that the challenge to the adequacy of the affidavit would have "some validity if the application to search the West 87th Street apartment had been the only application in this matter presented at this time to the U.S. Commissioner" but in view of the other applications to search the "wire rooms" concluded that the attack was "hypertechnical". (Appendix A, *infra*, p. 20) Genetempo, the renter of the apartment, was never seen at any of the wire rooms, and there is no such allegation in any of the applications to that effect, and indeed there is no trial testimony to that effect. There is no allegation in the warrant for the 87th Street premises that any of the persons claimed to be seen coming from the wire rooms carried any records or papers or paraphernalia, nor is there any allegation in any of the other warrant applications that persons were seen going from the places sought

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said Joe Carroll on 4 occasions proceeding from the aforesaid wire-rooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal that the said Joe Carroll has not paid the special tax imposed by 26 U.S.C. §4411.

/s/ DAVID A. OSTRAGER
Special Agent

Sworn to before me, and subscribed in my presence, March 21, 1963.

/s/ FRANK R. ABBOTT
United States Commissioner

to be searched under the other warrants to the 87th Street premises with any papers or other apparatus. Much of the matter relied on by the Court of Appeals was simply not in the affidavits before the Commissioner (A. 15, 19, 23). What those affidavits establish is indeed established by the affidavit in the application for the search of the 87th Street premises, that is to say that Carroll, who was taking bets elsewhere, was visiting those premises. The affidavit for the 93rd Street warrant (A. 15) does not give any date for the placing of bets, the affidavit for the search of the 89th Street premises does not give any date for the placing of bets (A. 19), nor does the application for the 90th Street premises (A. 23) give any date. The application for the search of the 87th Street premises does not give any date for the observed visits of the contaminating Carroll-Serao, so that there was no basis for the Commissioner to assume in terms of time that Carroll's visits to 87th Street were necessarily or even probably connected with bookmaking or gambling activity in which he had just engaged.

Of equal importance and significance, the Commissioner, who was supposedly exercising his common sense, was as a matter of logic required to have a special knowledge of the nature of gambling and the relationship between so-called wire rooms and tally rooms. That such knowledge is not a matter of common sense is obvious. The Government apparently thought so, for in the course of the trial it put Agent Cotter on and qualified him as an expert witness in order that he might explain these terms to the jury (T. 262-263).

This case represents a serious erosion of the standards for the issuance of search warrants. The only probable

cause which existed, so far as the Commissioner knew from all the affidavits before him when he issued the warrants, was that which adhered to the person of Carroll in the wire rooms, and which was carried like a contagious disease and spread by Carroll to the 87th Street premises. If the warrants here are sustained, a householder who wishes to be free from search must not only prohibit the entry of contraband and the conduct of illegal activity in his home, he must also deny access to his house to anyone who does wicked things at other places. It will not be enough for the householder to judge from the conduct of his visitor or the paraphernalia on his visitor's person, he must inspect his visitor's character. Indeed in this case Agent Ostrager's affidavit reveals that the Government looked into the 87th Street premises and observed Carroll, and since they failed to mention observing any gambling apparatus or paraphernalia one may reasonably infer that there was none to be seen. But the Government knows, and apparently persuaded the Commissioner, that as a man thinketh in his heart, so is he, and so becometh the places he visits.

A comparison of the affidavit here with the affidavit sustained by this Court in *United States* v. *Ventresca,* 380 U.S. 102 (1965), is most illuminating. The affidavit in *Ventresca* which is set out as an appendix to the opinion of the Court, *ibid.* 112-116, occupies slightly over four pages in the printed report of the case and details with the greatest specificity the transfer of bags of sugar and large metal cans, relates the aroma of fermenting mash and states that sounds emanating from the cans were "consistent with that of cans containing liquid." These observations were directly connected with the premises which were the subject of the

warrant and fairly led to the conclusion that what was going on in those premises was an illegal still operation. The affidavit related specifically the coming and going of the paraphernalia of that operation from the premises sought to be searched.

The task of the judicial officer before whom an application for a search warrant is made is to make an independent judgment of its sufficiency. The rule was succinctly stated in *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958):

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

We respectfully submit that the language of this Court in striking down the search warrant in *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), is most pertinent:

> "The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'
>
> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where

> he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,* at 14, or, as in this case, by an unidentified informant.
>
> We conclude, therefore, that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and that the evidence obtained as a result of the search warrant was inadmissible in petitioner's trial."

We recognize that the mere fact that a case has been wrongly decided, even when the decision is as egregiously wrong as the upholding of the warrant here, does not in and of itself justify review by this Court. However, in the area of fundamental constitutional guarantees, like the Fourth Amendment's guarantee against unreasonable searches and seizures, the vitality of this Court's rulings can easily be undermined by decisions which give niggardly application to the protections of the Constitution.

We reiterate our request for an opportunity to brief and argue the constitutionality of the wagering tax statutes.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
ROBERT KASANOF
Attorneys for petitioners

December 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 12—September Term, 1966.

(Argued September 19, 1966 Decided October 20, 1966.)

Docket No. 30548

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH SERAO, CHARLES CAFARO and BENJAMIN GENETEMPO,

Appellants.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeals from convictions, United States District Court for the Southern District of New York, MacMahon, *J.*, with jury, for wilful failures to comply with gamblers' business tax and gamblers' registration requirements, 26 U. S. C. §§4411, 4412, 4401, 7203. Convictions affirmed.

DANIEL R. MURDOCK, MICHAEL W. MITCHELL, Asst. U. S. Attorneys, Robert M. Morgenthau, U. S. Attorney, Southern District of New York, *for Appellee.*

ALBERT J. KRIEGER, ROBERT KASANOF, New York City, *for Appellants.*

WATERMAN, *Circuit Judge*:

Appellants Serao, Cafaro, and Genetempo appeal from judgments of conviction entered against them after a jury returned verdicts that they were "wilfully guilty" of wilful failure to pay a special tax imposed on persons engaged in receiving wagers on behalf of one engaged in the business of accepting wagers, 26 U. S. C. §§4411, 4401, and wilful failure to register as required by 26 U. S. C. §§4412, 7203.

Appellants were involved in a bookmaking operation by which bettors made wagers over the telephone. The telephones of the bookmakers, the "wire room," were located at three New York City apartments, Apt. 11 at 329 W. 89th, 3B at 261 W. 90th, and 1AA at 255 W. 93rd Streets. The record-keeping part of the business was carried on in a fourth apartment, Apt. B at 327 W. 87th Street, the "tally room," which contained no telephone. Special agents of the Internal Revenue Service, after placing bets with Serao in person, called them in to telephones located in the three "wire room" apartments, whose numbers Serao gave them. The appellants were observed on different occasions going to and departing from the four apartments. On March 5,

1963, Serao was observed walking from the W. 93rd Street apartment to the W. 87th Street apartment. On March 11, Genetempo and Cafaro (twice) were seen entering the W. 87th Street apartment; on his second trip Cafaro was seen carrying a brown paper bag. On March 13, Genetempo was seen leaving and later reentering the W. 87th Street apartment; and still later Cafaro arrived there carrying a brown paper bag. On March 14, Genetempo was observed leaving and reentering the W. 87th Street apartment and Serao was seen to leave the W. 90th Street apartment, to drop a brown paper bag containing gambling paraphernalia into a trash can, and later to go into the W. 87th Street apartment. On March 16 and 18, Serao was watched while entering the W. 90th Street apartment. On March 19, Serao and Genetempo were seen together at the W. 87th Street apartment. Under fictitious names the W. 93rd Street apartment and the W. 87th Street apartment were leased by Cafaro and Genetempo respectively.

Warrants were thereafter obtained to search the four apartments for gambling paraphernalia and to arrest Serao, who was known to the government agents as Joe Carroll. The apartments were searched and a sizeable amount of gambling paraphernalia was seized.

All appellants challenge the constitutionality of the statutes under which they were convicted. We rejected such attacks in *United States* v. *Costello,* 352 F. 2d 848 (2 Cir. 1965), *cert. granted,* 383 U. S. 942 (1966), and *United States* v. *Conti,* 361 F. 2d 153 (2 Cir. 1966), and we likewise reject this one. This is the only contention advanced by appellant Serao, and his conviction is affirmed. We now discuss other

contentions advanced by appellants Cafaro and Genetempo.

Genetempo and Cafaro challenge the propriety of the issuance on March 21, 1963 of the search warrant authorizing a search of the W. 87th Street apartment. They each claim that the supporting affidavit of the special agent who applied for the warrants was insufficient. The affidavit is set forth herein in full:

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HON. FRANK R. ABBOTT, U. S. Courthouse, Foley Sq., New York, N. Y.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Apt. B, 327 West 87th Street, New York, New York in the Southern District of New York, there is now being concealed certain property, namely gambling paraphernalia, including but not limited to horse betting slips, baseball and basket ball slips, other sporting slips and money, which are being used as means of committing a criminal offense, to wit, the business of accepting and receiving wagers, in violation of 26 U. S. C. §§4401, 4411, 4412 and 7272,

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who have placed wagers by telephone at 3 different locations hereinafter referred to as wirerooms, with an individual known as Joe Carroll. 2. Who observed said Joe Carroll on 4 occasions pro-

ceeding from the aforesaid wirerooms to the premises at 327 West 87th St. 3. Who observed 2 unknown individuals leaving 2 different wirerooms premises and who were on several occasions observed entering the premises at 327 West 87th St. 4. That Joe Carroll was observed inside Apt. B at 327 West 87th St. 5. That a search of the records of the Internal Revenue Service reveal that the said Joe Carroll has not paid the special tax imposd by 26 U. S. C. §4411.

/s/ DAVID A. OSTRAGER
Special Agent

Sworn to before me, and subscribed in my presence, March 21, 1963.

/s/ FRANK R. ABBOTT
United States Commissioner

Appellants claim that this affidavit contains no basis for concluding that the visits to this apartment by "Carroll" and the others were not for innocent purposes unrelated to the activities at the other apartments. They also claim that the location of the wirerooms, the numbers and dates of bets placed at each, and the dates upon which the surveillance of the appellants took place should have been specified in the affidavit.

Appellants' challenge to the adequacy of the affidavit might perhaps have some validity if the application to search the W. 87th Street apartment had been the only application in this matter presented at this time to the U. S. Commissioner, but under the circumstances of the present case there is no merit whatever to appellants' claims. On the same day that this application was made,

the same special agent presented to the same U. S. Commissioner applications for warrants to search the three "wireroom" apartments and to arrest Joe Carroll. These four other warrants were issued and their issuance is not challenged here. The U. S. Commissioner in issuing the challenged warrant could surely consider the facts he contemporaneously learned from the affidavits presented to him in support of these other applications, all of which contained references to Joe Carroll and to the bookmaking operation. See *United States* v. *Markis,* 352 F. 2d 860, 864 (2 Cir. 1965). Even if it be assumed that the so-called essential facts that appellants claim are missing from the challenged affidavit are wanting, one easily infers from the affidavit, standing alone, that the Commissioner had probable cause to believe that Joe Carroll's trips and those of the other two individuals from the wirerooms to the W. 87th Street apartment bore a direct relationship to the wireroom activities. And, most assuredly, the Commissioner, in making his independent judgment as to the sufficiency of the affidavit submitted in support of the application to search the suspected W. 87th Street apartment, could quite reasonably infer that very likely in this apartment was that part of the appellants' operation that was being conducted away from the wirerooms. It would be hypertechnical for the Commissioner not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day. And, as the United States Supreme Court admonished in *United States* v. *Ventresca,* 380 U. S. 102, 109 (1965), "the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner."

Appellant Cafaro claims his rights under the Fifth and Sixth Amendments were violated by the Government's introduction into evidence of a handwriting sample procured from him after his arraignment. The sample was one of two handwriting specimens used by the Government as a standard for comparing Cafaro's handwriting with the handwriting on the gambling records seized.

The sample was obtained when the Internal Revenue Service began a routine investigation of Cafaro's income tax returns after his arrest in this case on March 22, 1963. As part of this investigation, the Service sent a form to Cafaro on April 19, 1963, after the Service was unable to find that Cafaro had filed a federal income tax return for the calendar year 1961 in either the Manhattan District or the Brooklyn District. The form requested that an explanation be made on the back side of it, and, in his own handwriting, Cafaro wrote such an explanation. Cafaro was not required to write an answer; his voluntary reply could have been typed, written by someone else for him, or he could have made no answer at all.

Aside from the fact that Cafaro was under no compulsion to give the handwriting sample, he has no claim that his constitutional rights have been infringed. The Supreme Court in *Schmerber* v. *California*, 384 U. S. 757 (1966) limited the Fifth Amendment privilege to evidence of a testimonial or communicative nature. While Cafaro's writing was communicative for another purpose it was used here merely as a handwriting standard for identification, not to communicate any information related to the issues being tried. Obviously, there is no merit to the claim that a constitutional right of Cafaro was infringed by this vol-

untary act of his. Even identification procedures requiring fingerprinting or the giving of blood samples do not infringe. The Court noted in *Schmerber, supra* at 764, that "both federal and state courts have usually held that [the privilege against self-incrimination] offers no protection against compulsion . . . to write . . . for identification." As Cafaro was deprived of no rights under the Fifth Amendment, presence of his counsel would have availed him nothing. He therefore has no Sixth Amendment claim. *Schmerber* v. *California, supra* at 765-66.

Appellant Genetempo claims that the evidence was insufficient to sustain his conviction because it does not show that he performed other than mere ministerial or clerical duties. See *United States* v. *Calamaro*, 354 U. S. 351 (1957). We find no merit in this contention. The evidence is clearly sufficient to allow a finding that he performed more than a mere ministerial or clerical function. In fact, it would support a finding that he was supervising the whole operation. By the nature of the bookmaking operation the apartment which Genetempo leased under a false name and which he was often observed entering and leaving was the center of the operation. The wagers received at the various wire-rooms were taken to this "tally room" to be recorded. Several hundred of the summary sheets reflecting the credit of the bettors and the earnings of the operation seized at the tally room were in Genetempo's handwriting as were also a number of bet slips and even a summary sheet seized at the W. 93rd Street apartment.

The convictions of all three appellants are affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of October one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH SERAO, CHARLES CAFARO, BENJAMIN GENETEMPO,
Defendants-Appellants,

ARMAND ROMANELLI,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A DANIEL FUSARO
Clerk

APPENDIX C

Opinion by McGohey, D.J. on Pre-trial Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 CR. 773

UNITED STATES OF AMERICA

v.

JOSEPH SERAO, CHARLES CAFARO, BENJAMIN GENETEMPO and ARMAND ROMANELLI,

Defendants.

MEMORANDUM AND ORDER

The United States Attorney has filed an information charging that the defendants being "engaged in the business of accepting wagers and in receiving wagers for and on behalf of a person engaged in the business of accepting wagers," failed to pay the special tax imposed by law and failed to register as required by law with the official in charge of the internal revenue district. The defendants have moved for bills of particulars and the suppression as evidence of certain property seized in four separate apartments.[1] The papers raise no issue of fact as to the latter motions. Accordingly, no hearing has been held.

1. Two identical motions were filed; one on behalf of Serao and Cafaro, the other on behalf of Genetempo and Romanelli. The supporting affidavits are by counsel. No affidavit by any defendant has been filed. The motion were argued as one.

The government has consented to furnish the particulars specified in the first and third demands. It is directed to furnish the particulars specified in the second demand also.

It is not disputed that on March 21, 1963, a United States Commissioner in this district issued a warrant for the arrest of "Joe Carroll," now known to be the defendant Serao, and four search warrants for premises severally described as "Apt. 3 B, 261 West 90th Street, New York," "Apt. 11, 329 West 89th Street, New York, New York," "Apt. 1 AA, 255 West 93rd Street, New York, New York," and "Apt. B, 327 West 87th St., New York, N. Y." Each warrant was based upon an affidavit of Special Agent David Ostrager of the Internal Revenue Service.

On the following day, March 22, 1963, pursuant to the warrant issued for the arrest of "Joe Carroll," the defendant Serao was arrested in apartment 1 AA, 255 West 93rd Street. The apartment was searched at the same time and certain property allegedly used to conduct gambling operations was seized. No other defendant claims to have been in that apartment at the time of the search or at any other time; and no defendant claims an interest of any kind in that apartment or its furnishings or any of the property seized in it.

The apartments described in the other search warrants also were searched on March 22. There is no claim that any defendant was in any of these apartments at the time it was searched or at any other time. Moreover, there is no claim that any defendant ever had or now has an interest of any kind in any of these apartments, or in its furnishings or any of the property seized therein.

It is clear from the foregoing that the only defendant who can claim to be "a person aggrieved"[2] by any of the searches is Serao; and even he can make such claim only with respect to the search of apartment 1 AA at 255 West 93rd Street in which he was arrested.[3] It is contended that the affidavit on which the warrant for the search of that apartment was issued was insufficient to justify the Commissioner's conclusion that there was probable cause for its issuance. The contention is rejected.

The affidavit which, as noted above, was made by a Special Agent of the Internal Revenue Service, states that "the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of Special Agents of the Internal Revenue Service: 1. Who placed wagers at telephone number AC 2-7926. 2. That the aforesaid telephone number was supplied to a Special Agent by an individual known as Joe Carroll for the purposes of placing wagers. 3. That investigation has disclosed that telephone number AC 2-7926 is installed at Apt. 1 AA at 255 West 93rd Street, New York, New York. 4. That a search of the records of the Internal Revenue Service revealed that neither the person known as Joe Carroll nor any other person residing at Apt. 1 AA at 255 West 93rd Street, New York, New York had paid the special tax imposed by 26 U.S.C. §4411." That affidavit was clearly sufficient to support the Commissioner's conclusion as to

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2. Rule 41(e) of the Federal Rules of Criminal Procedure.

3. Jones v. U. S., 362 U.S. 257, 261.

probable cause.[4] But even if it were not, the search was nevertheless lawful, being incident to Serao's arrest which was made pursuant to an arrest warrant as to which no challenge of any kind has been made.

The motions for particulars are severally granted to the extent indicated. Otherwise they are severally denied.

The motions to suppress are severally denied.

So Ordered.

Dated: New York, N. Y., November 12, 1963.

/s/ JOHN F. X. MCGOHEY
U. S. D. J.